Supreme Court, U.S.
FILED
MAY 10 2002
OFFICE OF THE CLERK

No. 01-785

IN THE

Supreme Court of the United States

JIMMY SEARLES,

Petitioner,

v.

DURWAND A. VAN BEBBER, Administrative Chaplain
Hutchinson Correctional Facility,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

QUESTIONS PRESENTED

42 U.S.C. § 1997e(e) (part of the Prison Litigation Reform Act of 1996) provides that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury."

The questions presented by the interpretation of this provision in this case are as follows:

1. Whether the § 1997e(e) requirement of proof of a "physical injury" applies to *all* prisoner claims, including those based on alleged constitutional violations?

2. Whether § 1997e(e) precludes an award of punitive damages when no compensatory damages are awarded or recoverable?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

CERTIORARI CONSIDERATIONS 3

I. There Is A Circuit Split On Two Issues Cleanly Presented In This Case. 3

II. The Court May Consider It Appropriate To Seek The Views Of The United States. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) . . . 5, 9, 10
Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998) 5-6
Carey v. Piphus, 435 U.S. 247 (1978) 6, 7, 8
Cassidy v. Indiana Dep't of Corrections, 199 F.3d 374 (7th Cir. 2000) 9
Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998) 5, 10
Farrar v. Hobby, 506 U.S. 103 (1992) 8
Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001) 5
Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 6, 7, 8
Porter v. Nussle, 534 U.S. 516 (2002) 7
Robinson v. Page, 170 F.3d 747 (7th Cir. 1999) 6
Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999) 6
Searles v. VanBebber, 251 F.3d 869 (10th Cir. 2001) 10
Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002) 5, 9, 10

Statutes

42 U.S.C. § 1983 . . . . . 6, 7
42 U.S.C. § 1997e(e) 4, 6

STATEMENT OF THE CASE

It is important—in putting the statutory interpretation issues raised here into context—to look at precisely what the jury found in this case.

As set forth in the appendix to the petition for a writ of *certiorari* ("Pet. App.") at 23-28, the jury completed a special verdict form as follows[1]:

6. Do you find by a preponderance of the evidence under Instruction No. 14 that defendant Durwand VanBebber is liable to plaintiff?

   Yes X

   No _

7. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. VanBebber caused physical injury to plaintiff?

   Yes _

   No X

8. If so, state the amount of damages that you find Mr. Searles suffered as a result of his physical injuries.

   0

9. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. VanBebber caused mental and emotional injuries to plaintiff?

   Yes X

   No _

---

[1] Only questions relevant to the liability of defendant Chaplain VanBebber are excerpted; the jury found no liability for two other defendants.

10. If so, state the amount of damages that you find Mr. Searles suffered as a result of his mental and emotional injuries.

$3,650

16. If you have found that any defendant violated plaintiff's constitutional rights under Instruction No. 13, Instruction No. 14, or Instruction No. 15, but do not find that plaintiff suffered physical injury or mental and emotional injuries on account of the violation, do you find by a preponderance of the evidence under Instruction No. 20 that plaintiff is entitled to recover nominal damages?

Yes _

No X

Pet. App. 24-26.

The jury also imposed liability for punitive damages on Chaplain VanBebber as follows:

20. Do you find by a preponderance of the evidence under Instruction No. 22 that defendant Durwand VanBebber acted with reckless indifference to Mr. Searles' right to free exercise of religion?

Yes X

No _

21. If so, state the amount of punitive damages that you find by a preponderance of the evidence under Instruction No. 22 that defendant Durwand VanBebber should pay.

$42,500.00

Pet. App. 27.

To summarize, the jury found that (1) Chaplain VanBebber violated inmate Searles's constitutional rights (Searles alleged a First Amendment free exercise of religion claim), (2) that Searles suffered *no physical injury*, (3) that Searles was not entitled to *nominal* damages, but that (4) Searles had *mental and emotional* damages of $3,650, and (5) Searles also should receive $42,500 in *punitive* damages.

The Tenth Circuit reversed the award of mental and emotional damages, concluding that § 1997e(e)'s requirement of proof of "physical injury" (and the jury's finding that there was no such injury in this case) precluded that award as a matter of law. Pet. App. 8-12.

The Tenth Circuit, however, in spite of the jury's findings, directed that a nominal damage award be made on remand, declaring that "the rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation . . . ." Pet. App. 17.

The Tenth Circuit vacated the punitive damage award—because the jury was instructed to calculate it with reference to the award for mental and emotional suffering—but the Tenth Circuit also held that as a matter of law punitive damage awards are not prohibited under § 1997e(e) when there is no proof of "physical injury" and thus no compensatory damages are awarded. Pet. App. 17-21.

CERTIORARI CONSIDERATIONS

I. There Is A Circuit Split On Two Issues Cleanly Presented In This Case.

There is a clear split of authority in the federal Circuits on at least two questions of law presented in this case. **First**, the Circuits are split on the question whether § 1997e(e)'s "physical injury" requirement applies to *all* inmate claims, including constitutional claims such as assertions of First Amendment rights. **Second**, there is a split of authority on the

important question whether § 1997e(e) permits an award of punitive damages when no compensatory damages are awarded or recoverable.

A majority of Circuits agree with the Tenth Circuit's resolution of the first issue that the "physical injury" requirement applies to all prisoner claims that fall within the plain language of the statute, including constitutional claims. A slight majority also appear to agree with the Tenth Circuit that punitive damages may be awarded even when no compensatory damages are awarded or recoverable

Both issues are important in the context of inmate litigation, both have arisen and will continue to arise with some frequency, and the two issues are intertwined both logically and as a matter of interpreting § 1997e(e).

Whether in this case or later, these questions likely will require resolution by this Court. Thus, Kansas respectfully requests that the Court either deny the petition in this case, or grant review of both issues.

1.A. Section 1997e(e) provides in pertinent part that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." The first question raised in this case is whether this statutory provision means what it plainly says.

In other words, is the requirement of proof of "physical injury" applicable to *all* prisoner claims for "mental or emotional injury suffered while in custody"? Or, as some Circuits have held, is the statute inapplicable to constitutional claims, such as claims under the First Amendment?

B. The Tenth Circuit—like a majority of the Circuits—correctly decided the issue in this case, holding

> We are persuaded instead that section 1997e(e) should be held to apply in the instant case because of its plain

> language. The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted. The underlying substantive violation, like Canell's First Amendment wrong, should not be divorced from the resulting injury, such as "mental or emotional injury," thus avoiding the clear mandate of § 1997e(e). The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional.

Pet. App. 11.

Most Circuits agree with the Tenth Circuit. *See, e.g., Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002) ("we conclude that Section 1997e(e) applies to all federal civil actions including claims alleging constitutional violations"); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) ("The plain language of § 1997e(e) makes no distinction between the various claims encompassed within the phrase 'federal civil action' to which the section applies"); *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) ("§ 1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of the legal wrong"); *Herman v. Holiday*, 238 F.3d 660, 665-66 (5th Cir. 2001) (rejecting Eighth Amendment claim absent proof of "physical injury").

C. But the Ninth Circuit has flatly disagreed, and the Seventh Circuit has suggested a contrary interpretation in at least some of its cases. The Ninth Circuit, in addressing an inmate's allegations of deprivation of his right to the free exercise of religion, declared that

> The appellees in this case argue that this provision [section 1997e(e)] bars Canell's action because he is alleging only "mental or emotional injury" without the requisite physical injury. We disagree. Canell is not asserting a claim for "mental or emotional injury." He is asserting a claim for a violation of his First Amendment

> rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.

Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).

To similar effect is the Seventh Circuit's assertion that "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental or emotional injury he may have sustained," *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999), though the Seventh Circuit actually dismissed the complaint in that case on other grounds. *See also Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) ("It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil suits.").

D. Thus, there is a split of authority in the Circuits on this issue, but the Court might well decline to review the issue at this time for at least two reasons. First, a majority of the Circuits agree with the Tenth Circuit's reading of § 1997e(e), and most of the more recent decisions appear to line up with the Tenth Circuit.

Second, the Tenth Circuit's reading of § 1997e(e) is the only reading that squares with the plain language of the statute. The statute is written in very broad terms, referring to "[n]o Federal civil action . . . for mental or emotional injury suffered . . . ." Not a single word in the statute suggests an exception for constitutional claims, and indeed the broad language compels the contrary conclusion.

Furthermore, this Court's decisions such as *Carey v. Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), addressing damages under 42 U.S.C. § 1983, confirm that the plain meaning of § 1997e(e) is the proper interpretation. *Carey* rejected the argument that damages should be presumed for constitutional

violations, and instead stressed that the primary purpose of the section 1983 damages remedy is *compensation* because "[r]ights, constitutional and otherwise, do not exist in a vacuum." 435 U.S. at 254.

Stachura likewise rejected jury instructions that informed the jury it could award damages based on the jury's subjective assessment of the "value" or "importance" of the constitutional rights at issue. Indeed, the Court in *Stachura* also rejected the argument that distinctions should be made between various constitutional rights in terms of the damages available. 477 U.S. at 309. The Court concluded that there is "no room for non-compensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right." *Id.*

Thus, for civil damages liability purposes, the Court has repeatedly declined to create special rules for constitutional violations. Moreover, inmates have no constitutional claim to any particular types or levels of compensatory damages. Through 42 U.S.C. § 1983 Congress created a cause of action for those whose federal rights are violated by persons acting under color of state law. But Congress can impose limits or conditions on that cause of action, and in fact has done so on several occasions, especially with respect to prisoner claims.

Inmates can be particularly litigious, and perhaps more prone than some categories of litigants to file federal lawsuits over relatively small grievances. This Court long has recognized those facts. Indeed, just recently, this Court unanimously gave effect to the plain language of another provision of the Prison Litigation Reform Act which imposes an administrative exhaustion requirement on inmate suits involving *any* prison conditions. *Porter v. Nussle*, 534 U.S. 516 (2002).

In other words, another reason the Court could deny inmate Searles's petition is that the Tenth Circuit and a majority of

the Circuits are *correct* on the merits of the question presented.

2. A second question of law raised in this case is whether § 1997e(e) precludes an award of punitive damages when no compensatory damages are awarded or recoverable. This issue also has divided the Circuits.

A. The Tenth Circuit in this case vacated the jury's award of punitive damages—because it was based in part on consideration of the now reversed award of mental and emotional damages—but remanded for a new trial on what amount of punitive damages might be sustainable.

This remand, however, was unnecessary and inappropriate. The jury found that inmate Searles suffered *no physical injury* and that *nominal* damages were *not* warranted. And the Tenth Circuit correctly concluded that *no mental and emotional* damages could be awarded.

So, at this point, the *only* damages that inmate Searles should be left with are *punitive* damages, and it is incorrect to permit him to recover only *punitive* damages when no other damages were proven or awarded.

The Tenth Circuit had scant authority for the proposition that nominal damages are "mandatory" upon a finding of a constitutional violation. But more importantly, even assuming that were true, nominal damages alone generally do not provide a basis for awarding punitive damages, just as they generally do not provide a basis for awarding statutory attorney's fees. *See Farrar v. Hobby*, 506 U.S. 103 (1992). Nor does permitting inmates to recover punitive damages alone square with the Court's strong emphasis on *compensatory* damages in cases such as *Carey v. Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986).

B. The D.C. Circuit, unlike the Tenth Circuit, has correctly held—after striking a claim for mental and emotional damages when no physical injury was proved—that

> Nor do we think the punitive claim can survive. Amicus argues that because punitive damages are awarded to punish the tortfeasor rather than to compensate the victim, they are not embraced by § 1997e(e). But § 1997e(e) draws no such distinction. It simply prevents suits "for" mental injury without prior physical injury. As the purposes of compensatory awards themselves are multifaceted (including, for example, deterrence), it can hardly be the case that, when a suit alleges only mental or emotional injury, the presence of additional purposes makes a suit not "for" the injuries alleged. Further, *much if not all of Congress's evident intent would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages and an assertion that the defendant acted maliciously.*

Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (emphasis added).

C. Some Circuits, though, agree with the Tenth Circuit that nominal and punitive damages should be freely available in such suits, irrespective of whether any compensatory damages are awarded or recoverable.

Indeed, the Third Circuit rejected the very reasoning on which the D.C. Circuit relied. *See Allah v. Al-Hafeez*, 226 F.3d at 252 ("Accordingly, to the extent that Allah's punitive damages claims stem solely from the violation of his First Amendment rights, and not from any emotional or mental distress suffered therefrom, those claims are not claims brought 'for mental or emotional injury suffered' and are not barred by § 1997e(e)"). *See also Thompson v. Carter*, 284 F.3d at 418; *Cassidy v. Indiana Dep't of Corrections*, 199 F.3d 374, 376-77 (7th Cir. 2000).

D. This issue, with its resolution also depending as it does on the interpretation of the statutory prohibition on claims "for mental or emotional injury suffered," is intertwined with the first question presented in this case. Moreover, as the D.C. Circuit correctly held, whether an inmate suit for an alleged constitutional violation seeks compensatory or punitive damages when no physical injury has occurred, such a suit is "for mental or emotional injury" within the plain meaning of the statute.

Thus, Kansas respectfully requests that, if the Court decides to grant the petition, it direct the parties to brief and argue both of these related, intertwined issues.

II. The Court May Consider It Appropriate To Seek The Views Of The United States.

The United States has intervened in several of the Circuit cases discussed above, including this case, both to defend the constitutionality of § 1997e(e) and to offer views on its proper interpretation. *See, e.g., Thompson v. Carter*, 284 F.3d at 415; *Searles v. VanBebber*, 251 F.3d 869, 872 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d at 248; *Davis v. District of Columbia*, 158 F.3d 1342, 1345, 1346 (D.C. Cir. 1998).

In light of that previous federal participation in the cases and the federal interests at stake here, Kansas respectfully suggests that the Court may consider it appropriate in this case to seek the formal views of the United States through the Solicitor General.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that—if the Court decides to grant the petition—the Court grant review of both issues articulated in Kansas's statement of the Questions Presented, to resolve the split of authority in the Circuits on those important issues.

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

May 2002